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NOT FOR PUBLICATION

**HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. EC-04-1527-BMaS
)	
7	STEVEN G. HANSON and)	Bk. No. 02-93002
	STEPHANIE A. HANSON,)	
8)	Adv. No. 03-02204
	Debtors.)	
9	_____)	
)	
10	STEVEN G. DUNMORE,)	
)	
11	Appellant,)	
)	
12	v.)	M E M O R A N D U M¹
)	
13	STEVEN G. HANSON; STEPHANIE)	
	A. HANSON,)	
14)	
	Appellees.)	
15	_____)	

Argued and Submitted on June 24, 2005 at
Sacramento, California

Filed - August 10, 2005

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable David E. Russell, Bankruptcy Judge, Presiding

Before: BRANDT, MARLAR and SMITH, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

1 Unsecured creditors filed a complaint to deny the chapter 7
2 debtors' discharge under § 727(a).² After trial, the bankruptcy court
3 entered an order granting judgment in favor of the defendants.
4 Plaintiffs moved for reconsideration, which the bankruptcy court denied.
5 The appeal of both orders followed.

6 We AFFIRM the first order and DISMISS the appeal respecting the
7 second.

8
9 **I. FACTS**

10 Appellee Steven Hanson ("Hanson"), a California licensed attorney,
11 and his spouse Stephanie Hanson (jointly, "Hansons"), filed a joint
12 chapter 7 petition on 13 August 2002. Appellant Steven Dunmore, Hanson's
13 former client,³ filed a pro se complaint objecting to Hansons' discharge
14 under § 727(a), as well as § 523 dischargeability claims. Dunmore
15 alleged, inter alia, that Hansons improperly registered a vehicle in
16 their daughter's name, failed to schedule the sale proceeds of a
17 vehicle, failed to keep adequate business records, misreported values of
18 certain assets, improperly claimed tax deductions for mortgage interest
19 payments on real property which they did not own, and asserted that the
20 court should consider, as a false oath, a non-dischargeable judgment
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24 ² Absent contrary indication, all section and chapter
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330. "Rule"
26 references are to the Federal Rules of Bankruptcy Procedure and FRCP
27 references are to the Federal Rules of Civil Procedure.

28 ³ Kimberly Nelson was also a plaintiff in the adversary, but
did not appeal.

1 obtained by the IRS against Hansons for filing fraudulent tax returns
2 from 1989-99.⁴

3 Trial took place on 29 July 2004; neither party was represented.
4 Both debtors and plaintiffs' single witness, Donna Darr, testified.
5 Holding for the debtors, the bankruptcy court concluded:

6 I think that there were not sufficient facts to warrant this
7 Court finding that . . . the Hansons' discharge should be
8 denied.

8 . . .

9 [T]he burden of proof is by the preponderance of the evidence,
10 no longer clear and convincing. But because of the testimony
11 of Mr. Hanson and the other evidence in this case, I can only
12 conclude that the preponderance of evidence shows that . . .
13 the debtors were not trying to evade their responsibilities to
14 this Court in reporting what their assets and liabilities
15 were, and that the schedules were basically complete and that
16 there was no intent.

17 . . . I have to find by a preponderance of the evidence
18 that there was an intent by the debtors here to fail to list
19 their assets or to hide their assets or to deliberately avoid
20 honoring the orders of the Court. . . . I can't find
21 sufficient evidence for that conclusion.

22 Transcript, 29 July 2004 at 106 and 111-12.

23 On the issue of credibility:

24 I have no reason to distrust his testimony. . . . I found Mr.
25 Hanson to be a very credible and straightforward witness. He
26 answered every question. He answered them honestly in my
27 view. I have no reason to disbelieve any of his testimony.
28 When he stated that he provided you with all of the documents
he had at the time, I believe him.

Transcript, 29 July 2004 at 113.

26 ⁴ Hanson v. U.S., A-02-9015, U.S. Bankruptcy Court, Eastern
27 District of California (Modesto Division). The judgment was entered
28 on 6 October 2003 by Hon. Thomas Holman.

1 The Order Granting Discharge After Trial, entered 25 August 2004,
2 provided in part:

3 After the Plaintiffs had rested their case, the Defendants
4 moved for judgment on partial findings pursuant to FRCP 52(c).
5 After stating its findings of fact on the record concluding
6 that the Defendants/Debtors had been truthful with the court
7 and that there was insufficient evidence to establish their
8 intent to commit any acts that supported a denial of their
9 discharge, the court granted judgment to the
10 Debtors/Defendants.

11 Dunmore filed a Motion to Amend the Findings of Fact and/or Amend
12 Judgment, citing Rules 7052 and 9023(c), essentially a motion for
13 reconsideration rearguing the case, but also claiming Hansons had
14 perjured themselves at trial. The bankruptcy court denied the motion by
15 Civil Minute Order, entered 27 October 2004 (the "Order Denying
16 Reconsideration").

17 Dunmore timely appealed, seeking review of both the Order Granting
18 Discharge After Trial and the Order Denying Reconsideration.

19 **II. JURISDICTION**

20 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334(b) and
21 § 157(b) (1) and (2) (J), and we do under 28 U.S.C. § 158(a) (1) and (c).
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1 evidence. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990);
2 In re Travel Headquarters, Inc., 140 B.R. 260, 261 (9th Cir. BAP 1992).

3 4 **V. DISCUSSION**

5 **A. Finality**

6 Before trial the bankruptcy court had denied plaintiffs' motion for
7 summary judgment on their § 523 claims, and severed them. Civil Minute
8 Order, 22 December 2003. They were bifurcated and tried separately, and
9 the bankruptcy court entered judgment for Hansons on the § 523 claims
10 9 November 2004, rendering the § 727 judgment final. In re Daley, 776
11 F.2d 834 (9th Cir. 1985); In re Kashani, 190 B.R. 875, 882 (9th Cir. BAP
12 1995).

13 We have jurisdiction over this appeal.

14 **B. Judgment After Trial**

15 **1. Burden of Proof and Record**

16 The plaintiff's burden of proof in an adversary proceeding
17 objecting to discharge under § 727 is the preponderance of evidence. In
18 re Cox, 41 F.3d 1294, 1297 (9th Cir. 1994); Searles, 317 B.R. at 376.
19 And, as a matter of statutory construction, objections to discharge are
20 construed liberally in favor of the debtor and strictly against the
21 objector. In re Adeeb, 787 F.2d 1339, 1342 (9th Cir. 1986).

22 The excerpts of record for this appeal contain only a partial trial
23 transcript: we do not have the testimony of Donna Darr, and it is
24 unclear whether the remaining testimony is complete. Nothing in the
25 record reflects which exhibits were admitted and considered by the
26 bankruptcy court.

27 Limiting review to the excerpts of record we have, we consider
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1 whether the evidence supported any of the possible theories under
2 § 727(a) (2), (3), (4) or (5).

3 As noted above, it is Dunmore's burden as appellant to provide a
4 complete record on appeal. Kritt, 190 B.R. at 387. Where something is
5 omitted from the excerpts, we are entitled to presume that he does not
6 regard it as helpful to his appeal. In re Gionis, 170 B.R. 675, 680-81
7 (9th Cir. BAP 1994), aff'd, 92 F.3d 1192 (9th Cir. 1996) (table); In re
8 McCarthy, 230 B.R. 414, 416-417 (9th Cir. BAP 1999).

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10 **2. Fraudulent Transfer or Concealment of Property.**

11 Section 727(a) (2) (A) provides:

12 (a) The court shall grant the debtor a discharge, unless . . .
13 . . .

14 (2) the debtor, with intent to hinder, delay, or defraud a
15 creditor or an officer of the estate charged with the custody
16 of property under this title, has transferred . . . or
concealed . . .

17 (A) property of the debtor, within one year before the date of
the filing of the petition

18 "[T]wo elements comprise an objection to discharge under § 727(a) (2) (A):
19 1) a disposition of property, such as transfer or concealment, and 2) a
20 subjective intent on the debtor's part to hinder, delay or defraud a
21 creditor through the act of disposing of the property." In re Lawson,
22 122 F.3d 1237, 1240 (9th Cir. 1997); see also In re Wills, 243 B.R. 58,
23 65 (9th Cir. BAP 1999).

24 Debtors' daughter held title to a Lincoln Continental, though
25 debtors had exclusive use of it and included it in Schedule B under the
26 category of "property held for another." Hanson testified that he
27 originally bought it for her as a gift and registered it in her name,
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1 but she never took possession because she had no use for it. At trial,
2 Hanson testified:

3 Q. Why does it [the vehicle] remain in her name?

4 A. Because we didn't want to pay the registration and get it
5 smogged again.

6 Q. Is there any other reason why you still keep it in her
7 name?

8 A. Well, we were concerned about the IRS trying to grab it if
9 we transferred it into our name.

10 Q. Is that because you owe the IRS taxes?

11 A. They say I do.

12 Transcript, 29 July 2004 at 50.

13 The bankruptcy court found that the evidence did not establish an
14 intent to defraud a creditor, and that the issue of who owns property
15 was "ambiguous" when it involves a family transfer. Transcript, 29 July
16 2004 at 106-108. While there was some evidence Hanson may have intended
17 to conceal or transfer the asset, it was scheduled and was not
18 concealed, and the bankruptcy judge found Hanson's explanatory testimony
19 credible.

20 Without a complete record and considering that the trial judge is
21 in the best position to evaluate credibility, and that, on appeal, we
22 must give "due regard . . . to the opportunity of the bankruptcy court
23 to judge the credibility of the witnesses," Rule 8013; In re Thiara, 285
24 B.R. 420, 427 (9th Cir BAP 2002), we cannot say the court clearly erred.

25 **3. Records of assets and expenditures.**

26 Section 727(a) (3) provides:

27 (a) The court shall grant the debtor a discharge, unless

1 . . .

2 (3) the debtor has concealed, destroyed, mutilated, falsified,
3 or failed to keep or preserve any recorded information,
4 including books, documents, records, and papers, from which
5 the debtor's financial condition or business transactions
6 might be ascertained, unless such act or failure to act was
7 justified under all of the circumstances of the case[.]

8 This provision is intended to "enable [a debtor's] creditors reasonably
9 to ascertain his present financial condition and to follow his business
10 transactions for a reasonable period in the past." 6 Collier on
11 Bankruptcy ¶ 727.03[3][a], at 727-32 (Alan N. Resnick & Henry J. Sommer
12 eds., 15th ed. rev. 2005) (citations omitted). The Code places the
13 burden on the debtor both to maintain adequate, orderly records and to
14 produce them. If it is determined that a debtor's records are
15 inadequate, the burden shifts to the debtor to provide justification.
16 Cox, 41 F.3d at 1296.

17 Hanson has practiced law since 1990 as a "trusts" attorney, and has
18 handled thousands of clients' trusts. Yet his own bookkeeping was
19 fairly lax. Hanson testified that his computer's hard drive crashed, he
20 lost electronic files and could not produce their 2000 tax returns
21 because he sent his only copy to the IRS. He seemed unconcerned with
22 the need (or ability) to replicate lost computer data, for which he
23 apparently had no backup, and the missing federal income tax return for
24 2000, and other returns which he admitted were inaccurate. There were
25 a number of gaps in bank statements accounting for business income,
26 which he could not explain. Hanson had no financial statements, but
27 used "a little notepad to occasionally write down smaller amounts of
28 money that came in," which he could not find. Transcript, 29 July 2004
at 66-68. It is, however, unclear from the partial trial transcript

1 what records debtors actually did produce, and what exhibits were
2 admitted into evidence.

3 As noted above, there is no explicit finding on this cause of
4 action, but the trial court believed that Hanson provided everything he
5 had found and concluded that the deficiencies were not "sufficient to
6 require [that] . . . I should deny the Hansons their discharge."
7 Transcript, 29 July 2004 at 114. Although it appears Hansons at best
8 barely met the minimum requirements of keeping and preserving records,
9 without a complete appellate record, we cannot find clear error.

11 **4. False Oath or Account**

12 Section 727(a)(4)(A) denies discharge to any debtor who "knowingly
13 and fraudulently, in or in connection with the case . . . made a false
14 oath or account[.]" See also Wills, 243 B.R. at 64. To be denied
15 discharge under this section, three elements must be met: (1) a false
16 statement under oath or penalty of perjury; (2) made knowingly and
17 fraudulently; and (3) regarding a material fact. Searles, 317 B.R. at
18 377 (citation omitted).

19 In 2004, the IRS had obtained, by default, a nondischargeable
20 judgment against debtors for filing fraudulent tax returns. Hanson
21 testified that his attorney did not appear at a summary judgment
22 hearing, hence entry of the default. Dunmore argued that that fraud
23 should be considered under § 727(a)(4)(A), as it goes to Hanson's
24 "veracity and character." This argument is insufficient: under the
25 relevant time frame under § 727(a)(2)(A), the action complained of in
26 § 727(a)(4)(A) must have occurred within one year of the petition date.
27 The bankruptcy court found no evidence of the timing of tax filings:

1 "[T]he fraud apparently took place well before the bankruptcy. It's
2 really not that relevant to the . . . discharge of the debtor[s] in the
3 bankruptcy proceeding." Transcript, 29 July 2004 at 109-10. There is
4 no evidence beyond the IRS complaint in the record on appeal on this
5 point, and it discloses that the returns in question related to tax
6 years 1989-99, between three and twelve years prepetition.

7 Respecting more recent tax years, Hansons admitted that they owned
8 no real property but they made mortgage interest payments (by agreement
9 with the owner) on property held by a friend/landlord, and claimed, on
10 their 2001 and 2002 returns, deductions of \$12,600 and \$22,000
11 respectively. Hanson testified he had intended to purchase the house,
12 but prepetition, realized they would not qualify for financing. The
13 bankruptcy court found that, "[C]laiming the payments that they made, .
14 . . it's [a] perfectly legitimate . . . arrangement they had, at least
15 as far as I can determine. It's certainly not a fraudulent
16 arrangement. . . . I don't find that it was an attempt to hide anything
17 from this Court in respect to the bankruptcy, and that's the real
18 issue." Dunmore presented no authority or even argument that the tax
19 deductions were false oaths "in or in connection with" the bankruptcy
20 case, § 727(a)(4), or had or could have any impact on the case. And a
21 "false statement or omission that has no impact on a bankruptcy case is
22 not grounds for denial of a discharge under § 727(a)(4)(A)." Wills, 243
23 B.R. at 63 (citations omitted).

24 Finally, debtors sold a piano for \$1000, which Dunmore argued was
25 undervalued on their Schedule B (personal property). The bankruptcy
26 court found that the argument was "just a difference of opinion between
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1 the parties in this case." This does not evidence a false oath on the
2 schedules, as falsity was not established.

3 No clear error has been established.
4

5 **5. Failure to account for sale proceeds.**

6 Under § 727(a)(5), a discharge may be denied for failure to
7 "explain satisfactorily . . . any loss of assets or deficiency of assets
8 to meet the debtor's liabilities." Hanson admitted that he failed to
9 schedule sale proceeds of a 1995 Dodge Caravan, but testified that this
10 omission was an "inadvertent mistake." Dunmore claims it was worth
11 \$8000, but three months prepetition, debtors sold it for \$3000. The
12 bankruptcy court believed Hanson's testimony that the omission "was an
13 oversight, something that had been overlooked." Transcript, 29 July
14 2004 at 110. No clear error has been shown.
15

16 **C. Order Denying Reconsideration**

17 Dunmore made no argument about his Motion to Amend
18 Findings . . . [and] Judgment in his opening brief, so we may, and do,
19 consider it waived. In re Villar, 317 B.R. 88, 92 n.5 (9th Cir. BAP
20 2004); Jodoin, 209 B.R. at 143; see also Sedona Inst., 220 B.R. at 76;
21 Laboa, 224 F.3d at 980 n.6 (issues not specifically and distinctly
22 argued in the opening brief are deemed waived).

23 In any event, the motion simply reargued the case and sought to
24 introduce new evidence. Dunmore presented nothing that could not have
25 been presented at trial, In re Branam, 226 B.R. 45, 54 (9th Cir. BAP
26 1998), aff'd, 205 F.3d 1350 (table) (9th Cir. 1999); it was properly
27 denied. Were we not dismissing, we would affirm.
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1 **VI. CONCLUSION**

2 The trial judge found that the evidence failed to show, by a
3 preponderance of the evidence, any grounds to deny discharge. We are
4 presented with an incomplete record, and there is nothing to suggest the
5 determination of Hanson's credibility, which is left to the discretion
6 of the trial judge, was in error. In short, Dunmore has not shown clear
7 error in any of the bankruptcy court's factual findings, nor any error
8 of law.

9 On the merits of the judgment after trial, we AFFIRM.

10 Appellant having not briefed any issue regarding the Order Denying
11 Reconsideration, we find waiver and DISMISS the appeal of that order.